No. 15,350

IN THE

# United States Court of Appeals
## For the Ninth Circuit

WILLIAM B. CAMMARANO and LOUISE CAMMARANO, his wife,

*Appellants,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

## APPELLANTS' OPENING BRIEF.


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No. 15,350

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## For the Ninth Circuit

William B. Cammarano and Louise Cammarano, his wife,
*Appellants,*
vs.
United States of America,
*Appellee.*

## APPELLANTS' OPENING BRIEF.

### STATEMENT OF JURISDICTION.

Suit was brought by plaintiff taxpayers in the District Court for the recovery of income taxes, after timely claim for refund was filed with the Collector of Internal Revenue at Tacoma, Washington (TR. 3-10, 11-12, 44).

This is an appeal from a judgment rendered in said action against plaintiffs, appellants herein, and in favor of the United States, defendant and appellee. The judgment was entered on July 30, 1955 by the U. S. District Court for the Western District of Washington, Southern Division, sitting without a jury (TR. 49, 50).

The jurisdiction of the District Court was based upon 28 U.S.C., Sec. 1346(a)(1).

The jurisdiction of this Court on appeal is based on 28 U.S.C., Secs. 1291, 1294.

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## STATEMENT OF THE CASE.

The subject of this appeal is whether a Treasury Regulation (disallowing as a deduction certain types of business expenses) may be validly applied under Sec. 23(a) I.R.C. (allowing the deduction of all "ordinary and necessary" business expenses): to expenditures incurred by taxpayers for publicity in defeating an Initiative Measure which would have deprived taxpayers of their existing business.

Plaintiffs, Appellants herein, are husband and wife who owned a one-fourth interest in a partnership engaged in the wholesale distribution of beer in the State of Washington (TR. 45).

At the Washington State General Election of November 2, 1948 an Initiative Measure was submitted to a vote of the People. The Measure if enacted, would have placed the retail sale of beer exclusively in the hands of state-owned and operated retail liquor stores. The proposed Initiative had been previously submitted to the Legislature. However, the Legislature failed to act on the Measure during the 1947 session, whereupon the Initiative was submitted to the People in 1948. The Legislature was not in session during the year 1948 (TR. 22, 23, 45, 46).

During the year 1948 and prior to said election, the partnership of which Appellants were members, made payments totaling $3545.15 to a fund for the purpose of defeating the Initiative. Members of the Washington Beer Wholesalers Association, of which plaintiffs were members, made contributions to the fund as well as non members. The payments were made to the fund on the basis of the volume of business of each wholesaler (TR. 45, 46).

The fund was expended to combat the Initiative in a state-wide publicity campaign addressed solely to the public in the form of newspaper advertising, radio broadcasting, street car and billboard advertisements, and direct mail literature. The Initiative was defeated (TR. 46, 115).

Uncontradicted testimony was introduced that if the Initiative Measure had been enacted at least ninety per cent of the beer wholesalers of the State of Washington would have been put out of business; some of the wholesalers, acting as representatives of beer manufacturers, might thereafter have been able to do some business with the State. Since the plaintiffs were wholesalers and their customers were retailers, plaintiffs would have been deprived of all their existing customers had the Initiative been enacted (TR. 76, 77).

The Initiative was self-operative and no further action by the Legislature was necessary. However under the laws of the State of Washington, enactment of an Initiative Measure does not have the effect of a constitutional amendment. Any enacted Initiative

Measure may be subsequently amended by the Legislature by a two-third's vote within two years after enactment of the Initiative and by a majority vote thereafter (TR. 93-96).

Appellants, in filing their joint federal income tax return for the year 1948, deducted as a business expense their proportionate part of the expenditures so made by the partnership in the campaign against the Initiative (TR. 12, 16).

Sec. 23(a)(1)(A) of the Internal Revenue Code of 1939 as amended, provided that in the computation of net taxable income, a taxpayer shall have the right to deduct from gross income "All the ordinary and necessary expenses paid . . . in carrying on any trade or business . . ."

Treasury Regulations 111, Sec. 29.23(o)-1 relating to individuals provided: "Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda . . . are not deductible from gross income."

The Commissioner of Internal Revenue disallowed the expenditures as a deduction on the ground that a Regulation pertaining to corporations but containing the same language as the Regulation pertaining to individuals, previously quoted, barred the deduction of said expenditures (TR. 6, 21).

After payment under protest of the additional income tax assessed, and failure of the Commissioner to act upon Appellants' timely claim for refund, Appellants brought this action in the District Court for

recovery of the additional income tax so paid under protest (TR. 44).

The District Court affirmed the ruling of the Commissioner, on the ground that Reg. 111, Sec. 29.23 (o)-1 pertaining to individuals (previously quoted) barred said expenditures as a deduction from gross business income (TR. 47, 48).

This appeal involves the question whether: said application of the Regulation is unauthorized and hence invalid because in contravention of the intent of Congress expressed in Sec. 23(a)(1)(A) that all "ordinary and necessary expenses" paid in carrying on any business are deductible.

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## SPECIFICATION OF ERRORS RELIED UPON.

(1) The District Court erred in its finding of fact: "The payment made to the Trust Fund by Cammarano Brothers was for propaganda and was to defeat legislation, and was therefore neither ordinary nor necessary to the usual course of the partnership business." (Finding of Fact No. 11; TR. 47).

All of the expenditures were incurred in making a public appeal to the People in opposition to a measure voted upon by the People. The expenditures were made for the purpose of preserving the continuance of taxpayers' existing business: had the Initiative been enacted the partnership would have been deprived of all of its existing customers. The Supreme Court in a series of cases has held that such ex-

penditures are "ordinary and necessary expenses . . . incurred . . . in carrying on any trade or business . . ." within the express language and meaning of Sec. 23(a)(1)(A).

(2) The District Court erred in its conclusion of law: "But it is perfectly clear that the payment to the Trust Fund was entirely for propaganda, and aimed at the defeat of legislation. For both of these reasons, and without in any way condemning the stand taken in the campaign, the payment is not deductible under that Section, according to long-standing Treasury Regulations (TR. 111, Sec. 29.23(o)-1) and a host of judicial decisions." (Conclusion of Law No. 2; the reference to "that Section", as appears from the previous part of the conclusion of law, is to Sec. 23(a)(1)(A); TR. 47, 48).

Treas. Reg. 111, Sec. 29.23(o)-1, by reason of a series of Supreme Court decisions, cannot be validly applied to bar such expenditures as a deduction under Sec. 23(a)(1)(A) on the grounds of either public policy or as a justifiable exercise of the rulemaking authority of the Commissioner.

(3) The District Court erred in its conclusion of law: "Plaintiffs make much of the fact that the instant publicity campaign was aimed at the people generally rather than the legislature, but no such distinction is recognized by the cited cases nor does it commend itself to reason. Certainly publicity can be directed at legislators both directly and indirectly. But more important for purposes of this case, the measure at which the instant campaign was aimed

was clearly legislation, albeit subject to enactment by the people generally rather than members of a Legislature.'' (Conclusion of Law No. 2; TR. 48).

The Court erred in the foregoing conclusion of law for the same reasons herein stated with respect to the previous conclusion of law.

(4) The District Court erred in its conclusion of law: ''Plaintiffs are not entitled to a refund of their 1948 income taxes, and their complaint must be dismissed. Judgment may be entered accordingly''. (Conclusion of Law No. 3; TR. 48).

(5) The District Court erred in failing to find and conclude that the Regulation referred to cannot be validly applied to bar said expenditures as a deduction and in failing to find that said expenditures were ''ordinary and necessary'' expenditures incurred in carrying on a business within the meaning of Sec. 23(a)(1)(A) and therefore were deductible in the computation of taxpayers' net taxable income.

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## SUMMARY OF ARGUMENT.

(1) The Regulation cannot be validly applied to bar the instant expenditures as a deduction on the ground that the application of the Regulation falls within the authorized rule-making power of the Commissioner.

The function of the Commissioner is to administer the Revenue Code and to carry out within limits of a reasonable interpretation, the will of Congress expressed in the Code.

The Commissioner cannot validly apply a Regulation to the facts of a case where to do so contravenes the express language of a section of the Code even though the Regulation as applied to other facts may be valid.

The Supreme Court has held that expenditures made to preserve the continuance of an existing business are ordinary and necessary within the express language and meaning of Sec. 23(a)(1)(A), beyond question and as a matter of law.

(2) The Regulation cannot be validly applied to bar the instant expenditures as a deduction on the ground that Congress by re-enacting Sec. 23(a)(1)(A) has therefore impliedly adopted the instant application of the Regulation as a part of said Section.

The Regulation has been captioned and indexed by the Commissioner under sections of the Internal Revenue Code entitled and dealing with "Charitable and Other Contributions" (first under Sec. 23(n) and then under Sec. 23(o))—which Code sections are entirely different in concept and purpose from Sec. 23(a)(1)(A).

The Commissioner by his continued published acquiescence in a decision by the Tax Court, hereafter considered, has himself interpreted the Regulation as not applicable to expenditures incurred in connection with measures voted upon by the People.

To impute to Congress an implied adoption of an application of the Regulation contrary to the Commissioner's own captioning, indexing and interpreta-

tion of the Regulation, is therefore unreasonable and fictional.

In any event the Supreme Court has held that the theory of statutory re-enactment can never be invoked where an application of a Regulation contravenes the express language and meaning of a Code section. Application of the Regulation in the instant case directly contravenes Sec. 23(a) permitting the deduction of ordinary and necessary business expenses because the Supreme Court has held in a series of cases that expenditures incurred to preserve the continuance of an existing business fall within said Section beyond question.

(3) The Regulation cannot be validly applied to bar the instant expenditures as a deduction on the ground of public policy.

Congress in the enactment of the Revenue Code has not conferred any express authority upon the Commissioner to bar a deduction on the ground of public policy.

The Supreme Court has therefore held that public policy can be invoked by the Commissioner as a bar to the deduction of expenditures under Sec. 23 (a)(1)(A) only where the expenditures violate clearly declared public policy: sharply defined national or state policies proscribing particular types of conduct.

Expenditures incurred in making a direct and open appeal to the People in opposition to an Initiative Measure vitally affecting an individual's business, are

not in any conceivable way in violation of any public policy. On the contrary such expenditures incurred in the exercise of an individual's fundamental right of free speech are clearly in the public interest and in furtherance of public policy.

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Thus the Regulation cannot be validly applied to bar the expenditures here incurred, on the basis of any of the three only justifiable grounds for any possible valid application of the Regulation.

Each of the three foregoing premises upon which the conclusion is based that the lower court erred, is supported by decisions of the Supreme Court.

The final adjudications in pertinent decisions by the lower courts, hereafter also considered, are not necessarily in conflict with the conclusion that the Regulation cannot be validly applied to bar the expenditures here in question. To the extent, however, that any statements appear in such decisions to the contrary, they must yield to the superior authority of the Supreme Court decisions.

Preliminary to a consideration of the authorities in support of each of the foregoing premises, it is important to first consider the scope and purpose of the pertinent sections of the Revenue Code and the Regulation.

## ARGUMENT.

## I.

### PROVISIONS OF THE REVENUE CODE AND THE REGULATION.

The expenditures here in question, incurred in 1948, were subject to the provisions of the Revenue Code of 1939 as amended. The same sections of the Code have been embodied and renumbered in the existing Revenue Code of 1954, as hereafter indicated.

(1) *Section 23(a)(1)(A) of the Revenue Code of 1939* as amended (now Sec. 162(a)) relating to the deduction from gross income of ordinary and necessary expenses incurred in carrying on any trade or business provides:

> "§23. *Deductions from gross income.* In computing net income there shall be allowed as deductions:
>
> (a) *Expenses.*
>
> (1) *Trade or business expenses.*
>
> (A) *In general.* All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . ."

Plaintiff taxpayers claimed and now claim a deduction of the expenditures under the foregoing section of the Code.

The Commissioner in the Court below took the position that the provisions of the Regulation relating to lobbying, the promotion or defeat of legislation were referable to said section of the Revenue Code. The Court in its Conclusions of Law likewise referred

said provisions of the Regulation to said section of the Code (TR. 15, 16, 47, 48).

(2) *Section 23(o) of the Revenue Code of 1939* as amended (now Sec. 170) relating to deductions from gross income of contributions by individuals to an organization operated exclusively for religious, charitable, scientific, literary or educational purposes without any part of net earnings inuring to the benefit of any shareholder or individual provides:

> "(o) *Charitable and other contributions.*
>
> In the case of an individual, contributions or gifts payment of which is made within the taxable year to or for the use of:
>
> (1) The United States, any State, Territory, or any political subdivision thereof or the District of Columbia, or any possession of the United States, for exclusively public purposes;
>
> (2) A corporation, trust, or community chest, fund, or foundation, created or organized in the United States or in any possession thereof or under the law of the United States or of any State or Territory or of any possession of the United States, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, *and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation.* For disallowance of certain charitable, etc., deductions otherwise allowable under this paragraph, see sections 3813 and 162

(g)(2);" (italics ours; Sec. 23(q) relating to corporations contains a similar provision).

Plaintiff taxpayers do not claim a deduction of the expenditures under the foregoing section.

Neither the Commissioner in the Court below nor the Court in its Conclusions of Law, took the position that the provisions of the Regulation relating to lobbying, the promotion or defeat of legislation were referable to said section of the Revenue Code.

However, the following history of Sec. 23(o) has been set forth for the purpose of showing that the concept, purpose and considerations involved in the enactment of Sec. 23(o) by Congress are entirely different from Sec. 23(a).

Section 23(o), previously set forth, expressly provides that the deduction shall only be allowed if no substantial part of the activities of the charitable, religious or educational, non profit organization: ". . . is carrying on propaganda, or otherwise attempting to influence legislation." On the other hand Sec. 23(a)(1)(A) significantly contains no similar words of limitation.

The expenditures here in question, incurred in preserving the continuance of taxpayers' existing business, clearly fall within the scope and application of Sec. 23(a)(1)(A) and do not fall within the scope and application of Sec. 23(o) relating to "Charitable and other contributions."

Deductions allowable under Sec. 23(o) are of an entirely different type and character than deductions allowable under Sec. 23(a)(1)(A).

Under Sec. 23(a)(1)(A) an expenditure in order to be deductible: (1) must be incurred in carrying on a trade or business and additionally (2) must be ordinary and necessary.

Under Sec. 23(o) a deduction is allowable without any requirement that the contribution be an ordinary and necessary expense incurred in the course of operating a business. A contribution falls within that section simply if the contribution is made to (1) a charitable, religious, educational or similar organization, non profit in character (2) no substantial part of the activity of which is carrying on propaganda or attempting to influence legislation. This is the section of the Revenue Code, of course, under which Community Chest and other charitable and religious contributions are allowable as a deduction to an individual regardless of whether the individual is engaged in business.

The proviso that no substantial part of the activities of such charitable, religious or educational organization shall be the carrying on of propaganda or attempting to influence legislation, was first enacted in 1934 as a part of Sec. 23(o). Prior to the Revenue Act of 1934, the Code sections which were the predecessors of Sec. 23(o) allowed deductions to charitable, religious, educational and similar organizations without the qualification of the proviso.

Sec. 23(o) and its predecessors pertained only to individuals. Corporations were not allowed to deduct contributions to charitable, religious or educational organizations under the Revenue Act of 1934 or under any prior Act. Sec. 23(r) of the Revenue Act of 1935 for the first time allowed corporations to deduct such contributions (Sec. 23(r) became Sec. 23(q) in the Revenue Act of 1936). The section so enacted in 1935 embodied substantially the same language as Sec. 23(o) relating to individuals and included the proviso that no substantial part of the activities of such charitable, religious or educational organization shall be the carrying on of propaganda or attempting to influence legislation.

Sec. 23(o) relating to individuals and Sec. 23(q) relating to corporations are now embodied in a single section of the Code numbered 170 in the Revenue Code of 1954.

The Congressional Record and reports of Committee hearings show that Congress in 1934, when the proviso was first enacted, was acutely aware of the existence of organizations whose primary purpose was the dissemination of propaganda under the guise of charitable, religious and educational organizations (Vol. 78 Cong. Rec.; Part 6, p. 5861, April 2, 1934; p. 5959, April 4, 1934: Part 7, pp. 7816, 7821, 7831, May 1, 1934). The Record shows that there was no discussion whatsoever or mention made of Sec. 23(a)(1)(A) on the floor of Congress or in the Committee hearings or reports. Congress was simply dealing with the question whether a charitable, religious, edu-

cational or similar organization should no longer be regarded as such for tax purposes, where a substantial part of the activities of any such organization is for the purpose of carrying on propaganda and influencing legislation.

Thus the history and context of Sec. 23(o) shows that it deals with a type and character of expenditure entirely different than Sec. 23(a)(1)(A). Sec. 23(o) relating to charitable and similar contributions concerns itself only: with the nature of the activities of the recipient of the contribution and allows such contributions as a deduction regardless of whether the donor is engaged in business or whether the contributions are ordinary and necessary to any business.

In contrast, Sec. 23(a)(1)(A) relating to expenses incurred in carrying on a business, concerns itself not with the activities of the recipient but only with the activities of the person making the expenditure and the nature of the business expenditure so made. The two sections deal with entirely different aspects of allowable income tax deductions. It is clearly manifest, therefore, that the insertion by Congress of the proviso as a part of Sec. 23(o) in 1934, involved matters of policy and considerations not in any way pertinent or related to Sec. 23(a)(1)(A).

In any event it is sufficient to observe that Congress in 1934 expressly included the proviso in Sec. 23(o) and expressly excluded the proviso from the language of Sec. 23(a). In subsequent re-enactments of the Revenue Code including the Revenue Act of 1954, Congress made no change whatsoever in the

express inclusion of the proviso in the one section and its exclusion from the other section.

(3) *Treasury Regulations 111* (now Regulations 118) in force during the year 1948 when the expenditures here in question were incurred and upon which the lower Court based its decision, provides:

> "Sec. 29.23(o)-1. Contributions or gifts by individuals.—
>
> A deduction is allowable under section 23(o) only with respect to contributions or gifts which are actually paid during the taxable year, regardless of when pledged and regardless of the method of accounting employed by the taxpayer in keeping his books and records. A deduction is not allowable, however, for the actual payment of a contribution or gift if the amount of such payment already has been deducted on the accrual basis in computing net income for any taxable year beginning before January 1, 1938. A contribution or gift to an organization described in section 23(o) is deductible even though some portion of the funds of such organization is or may be used in foreign countries for charitable and educational purposes. This section does not apply to contributions or gifts by estates and trusts (see section 162). For computation of deductions for charitable contributions where the taxpayer also has an allowable deduction for medical expenses, see section 29.23(x)-1.
>
> *   *   *   *   *   *   *
>
> In the case of husband and wife making a joint return, the deduction for contributions or gifts is the aggregate of such contributions or gifts made by the spouses, and is limited to 15 percent of the aggregate adjusted gross income of the

spouses or, for taxable years beginning prior to January 1, 1944, 15 percent of the aggregate net income of the spouses computed without the benefit of the deduction for contributions.

A donation made by an individual to an organization other than one referred to in section 23(o) which bears a direct relationship to his business and is made with a reasonable expectation of a financial return commensurate with the amount of the donation may constitute an allowable deduction as business expense.

*Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.*

*         *         *         *         *         *         *

. . . Claims for deductions under section 23(o) must be substantiated, when required by the Commissioner, by a statement from the organization to which the contribution or gift was made showing whether the organization is a domestic organization, the name and address of the contributor or donor, the amount of the contribution or gift and the date of the actual payment thereof, and by such other information as the Commissioner may deem necessary." (italics ours) (see Appendix for full text of the Regulation.)

It should be noted first that the Regulation in its preface is indexed by the Treasury "23(o)-1". This index refers to Sec. 23(o) of the Revenue Code relating to individuals, which section of the Code in turn is captioned "Charitable and other contributions".

In considering the subsequent topics of this brief it is important to trace in some detail the history of the Regulation and also of an additional Regulation pertaining to corporations, even though such historical recital may be somewhat tedious. The historical indexing of the Regulation by the Treasury under an intended applicable section of the Revenue Code and likewise the title given the Regulation by the Treasury, are important considerations in determining whether it may be contended that Congress, in re-enacting Sec. 23(a) of the Revenue Code, impliedly adopted the Regulation as a part of said Section.

The italicized provision with respect to lobbying and the promotion or defeat of legislation was first inserted in the Regulation in 1938. The Regulation was then a portion of Regulations 101, and was indexed and captioned "Art. 23(o)-1. Contributions or gifts by individuals."

The Regulation at all times thereafter continued to be so indexed and captioned by the Treasury under the Section of the Revenue Code, separately and distinctly relating to charitable, religious and educational contributions by individuals as distinguished from Sec. 23(a) of the Revenue Code relating to ordinary and necessary business expenses.

In *Textile Mills Sec. Corp. v. Commissioner*, 314 U.S. 326 (1941) the Supreme Court considered a Regulation pertaining to corporations, which also contained a provision relating to lobbying and the promotion or defeat of legislation. In view of the importance of the decision in the *Textile* case, which will be considered

hereafter in detail, the history of the Regulation pertaining to corporations must also be considered.

The Regulation pertaining to corporations was first issued in 1918 as Reg. 33, Art. 143. It read as follows:

> "Art. 143. Lobbying expenses.—Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, and contributions for campaign expenses are held not to be an ordinary and necessary expense in the operation and maintenance of the business of a corporation, and are therefore not deductible from gross income in arriving at the net income upon which the income tax is computed."

In 1919 the context of the Regulation was enlarged by including provisions: that donations to charitable and educational institutions were only deductible by a corporation when directly related to the business of the corporation, such as donations for the benefit of the employees or donations representing consideration for benefits flowing directly to the corporation. At that time and until 1935 corporations, unlike individuals, were not entitled to deduct charitable and educational contributions. The Regulation was thereafter successively captioned "Donations" and "Donations by corporations".

In 1935 corporations for the first time were given the right to deduct charitable, religious and educational contributions by enactment of Sec. 23(r) of the Revenue Code, immediately succeeded in 1936 by Sec. 23(q), which latter Code section was titled "Charitable and Other Contributions by Corporations". The Reg-

ulation in 1936 was indexed under "Art. 23(q)-1" of Regulations 94, the reference to "23(q)" being to Sec. 23(q) of the Code and was titled "Contributions or gifts by corporations". The indexing and captioning ever since that time has remained the same.

Thus the Regulations containing the provision with respect to lobbying and promotion or defeat of legislation, both in the case of individuals and in the case of corporations, have been indexed and captioned by the Treasury with reference to sections of the Code relating to charitable and other similar contributions, and not with reference to Sec. 23(a) relating to ordinary and necessary business expenses.

As previously pointed out, the Commissioner in the Court below took the position that the provisions of the Regulation relating to lobbying, the promotion or defeat of legislation were referable to Sec. 23(a)—not Sec. 23(o) (TR 15, 16).

The lower Court likewise in its Conclusions of Law held that said provisions of the Regulation were referable to Section 23(a)—not Sec. 23(o).

In the topics considered in this brief relating to the rule-making authority of the Commissioner [but not with respect to the topic of statutory re-enactment] and in order to meet the issue raised by the Commissioner and the Court below, we have assumed *arguendo,* that the Regulation relating to individuals may be referred to Sec. 23(a).

(4) *Section 3791 of the Revenue Code of 1939* as amended (now Sec. 7805) relating to the authority of the Commissioner to issue regulations, provides:

"§3791. *Rules and regulations.*

(a) Authorization.

(1) In general. Except as provided in section 1928(a), Cotton Futures, Section 2599, Marihuana, section 2559, Narcotics, section 2176 Liquor, and section 1805, Silver, the Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title."

In addition to the foregoing general authorization, Congress in numerous instances has re-incorporated the same provision in particular Code Sections dealing with specific subjects. Sec. 23(a)(1)(A) does not contain any such additional specific authorization.

In the light of the foregoing background of the context and history of the pertinent sections of the Revenue Code and the Regulation we will now consider the specific question whether: the Commissioner can validly apply the Regulation to bar as a deduction the expenditures here incurred for the purpose of preserving the continuance of an existing business—in the face of the Congressional mandate contained in Sec. 23(a)(1)(A) expressly allowing a taxpayer the right to deduct "all ordinary and necessary expenses . . . incurred . . . in carrying on any trade or business . . .".

## II.

### THE REGULATION CANNOT BE VALIDLY APPLIED TO BAR THE EXPENDITURES AS A DEDUCTION ON THE GROUND THAT ITS APPLICATION FALLS WITHIN THE AUTHORIZED RULE-MAKING AUTHORITY OF THE COMMISSIONER.

Before considering the series of cases wherein the Supreme Court has held that expenditures incurred for the purpose of preserving the continuance of an existing business are "ordinary and necessary expenses" within the meaning of Sec. 23(a) beyond question, the rule-making authority of the Commissioner should first be considered.

**(1) The Supreme Court has held that the function of the Commissioner is to administer the Revenue Code and to carry out within the limits of a reasonable interpretation the will of Congress expressed in the Code and that the application of any Regulation contrary to such will is invalid.**

In *Manhattan General Equipment Company v. Commissioner,* 297 U.S. 129 (1936), the issue was whether a regulation relating to the cost basis of stock upon reorganization was authorized and valid under a pertinent section of the Revenue Code. In holding the Regulation unauthorized and therefore invalid, the court said:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. Lynch v. Tilden Produce Co. 265 U.S.

315, 320-322, 68 L. ed. 1034-1036, 44 S. Ct. 488; Miller v. United States, 294 U.S. 435, 439, 440, 79 L. ed. 977, 980, 981, 55 S. Ct. 440, and cases cited. And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. International R. Co. v. Davidson, 257 U.S. 506, 514, 66 L. ed. 341, 346, 42 L. ed. 179. The original regulation as applied to a situation like that under review is both inconsistent with the statute and unreasonable." (pp. 134-135)

In *Helvering v. Sabine Transportation Company,* 318 U.S. 306 (1943) the issue was whether a payment was barred as a dividends paid credit by reason of a regulation enacted by the Commissioner under the Revenue Code. In holding the Regulation unauthorized and therefore invalid the court said:

> "It remains to consider the Treasury Regulations promulgated under the 1938 Act. These forbid a credit such as that claimed in this case, calling it a 'double credit.' We think the regulations are in the teeth of the unambiguous mandate of the statute, are contradictory of its plain terms, and amount to an attempt to legislate. They cannot prevail to preclude the credit claimed. The judgment is affirmed." (pp. 311-312)

In *Helvering v. Credit Alliance Corp.,* 316 U.S. 107 (1942) the Supreme Court in holding a Regulation unauthorized and invalid as applied to the facts of the case before it, said:

> "In view of what we have said as to the plain meaning of subsection (f), we think that no complexity or confusion is discoverable and that the regulation not only was contradictory of the plain

> terms of the subsection but attempted to add a supplementary legislative provision, which could only have been enacted by Congress." (p. 113)

**(2) The Supreme Court in considering Section 23(a)(2) which also contains a provision allowing the deduction of ordinary and necessary expenses held: that the section is in pari materia with Section 23(a)(1)(A) and that to the extent a regulation bars as a deduction expenses proximately resulting from the conduct of a business, the regulation is invalid.**

In *Bingham's Trust v. Commissioner,* 325 U.S. 365 (1945) taxpayer, a testamentary trust, sought to deduct $16,000.00 in legal expenses incurred in unsuccessfully contesting an additional assessment in income taxes.

Sec. 23(a)(2) of the Revenue Code authorized the deduction of ". . . *all the ordinary and necessary expenses* paid or incurred . . . for the production or collection of income, or for the management, conservation or maintenance of property held for the production of income." (p. 368) (italics ours)

Treasury Regulations 103, Sec. 19.23(a)-15 provided:

> "expenditures incurred . . . for the purpose of resisting a proposed additional assessment of taxes . . . are not deductible expenses under this section (§23(a)(2) of the Code) . . ." (p. 376)

The Supreme Court in reversing the Circuit Court, held that the Regulation, to the extent it barred the expenditures as a deduction, was invalid.

(1) In defining the words "ordinary and necessary" contained in Sec. 23(a)(2) and in Sec. 23(a)(1) the Court said:

"The requirement of §23(a)(2) that deductible expenses be 'ordinary and necessary' implies that they must be reasonable in amount and must bear a reasonable and proximate relation to the management of property held for the production of income." (p. 370)

"Section 23(a)(2) is comparable and *in pari materia* with §23(a)(1), authorizing the deduction of business or trade expenses. Such expenses need not relate directly to the production of income for the business. It is enough that the expense, if 'ordinary and necessary', is directly connected with or proximately results from the conduct of the business. Kornhauser v. United States, supra (276 US 152, 153, 72 L ed 506, 507, 48 S Ct 219); Commissioner of Internal Revenue v. Heininger, supra (320 US 470, 471, 88 L ed 174, 175, 64 S Ct 249). The effect of §23(a)(2) was to provide for a class of non-business deductions coextensive with the business deductions allowed by §23(a)(1), except for the fact that, since they were not incurred in connection with a business, the section made it necessary that they be incurred for the production of income or in the management or conservation of property held for the production of income." (pp. 373-374)

"Section 23(a)(2) does not restrict deductions to those litigation expenses which alone produce income. *On the contrary, by its terms and in analogy with the rule under §23(a)(1), the business expense section, the trust, a taxable entity like a business, may deduct litigation expenses when they are directly connected with or proximately result from the enterprise*—the management of property held for production of income.

Kornhauser v. United States, supra (276 US 152, 153, 72 L ed 506, 507, 48 S Ct. 219); Commissioner of Internal Revenue v. Heininger, supra (320 US 470, 471, 88 L ed 174, 175, 64 S Ct. 249)." (p. 376) (italics ours)

(2) In holding that the Regulation to the extent it contravened the express language of the Code Section was invalid, the Supreme Court in the *Bingham* case said:

"So far as this regulation purports to deny deduction of litigation expense unless it is to produce income, it is not in conformity to the statute, for the reasons already stated, or with the Regulation already mentioned, which provides that in addition to expenses for the production or collection of trust income, expenses of management or conservation of trust property held for the production of income are also deductible. *To that extent and to the extent that it departs from the rule of Kornhauser v. United States, supra, it conflicts with the meaning and purpose of §23(a)(2), and so is unauthorized.* Helvering v. R. J. Reynolds Tobacco Co. 306 US 110, 83 L ed 536, 59 S Ct 423." (p. 377) (italics ours)

**(3) The Supreme Court has held in a series of cases that expenditures incurred for the purpose of preserving an existing method of business are ordinary and necessary within the express language of Section 23(a)(1)(A) beyond question.**

In *Commissioner v. Heininger,* 320 U.S. 467 (1943), the Court stated the question before it as follows:

". . . whether lawyer's fees and related legal expenses paid by respondent are deductible from his gross income under Section 23(a) of the

> Revenue Acts of 1936 and 1938 as ordinary and necessary expenses incurred in carrying on his business." (p. 468)

Taxpayer was a mail order dentist. The expenditures were incurred in unsuccessfully contesting a charge by the Postmaster General that taxpayer's advertising through the mails was fraudulent. As a result of the adverse finding, taxpayer no longer could continue his method of advertising through the mails.

The Tax Court affirmed the disallowance of the expenditures by the Commissioner. The Circuit Court of Appeals reversed the Tax Court. The Supreme Court affirmed the decision of the Circuit Court.

(1) In stating the issue presented by the language of Sec. 23(a), the Supreme Court in the *Heininger* case said:

> "There can be no doubt that the legal expenses of respondent were directly connected with 'carrying on' his business. Kornhauser v. United States, 276 U.S. 145, 153, 72 L. ed. 505, 506, 48 S. Ct. 219; cf. Backer's Appeal, 1 BTA (F) 214; Pantages Theatre Co. v. Welch (CCA 9th) 71 F (2d) 68. Our enquiry therefore is limited to the narrow issue of whether these expenses were 'ordinary and necessary' within the meaning of §23(a)." (p. 470)

(2) In holding that the expenditures were ordinary and necessary beyond question, the Supreme Court in the *Heininger* case said:

> *"It is plain that respondent's legal expenses were both 'ordinary and necessary' if those words*

> *be given their commonly accepted meaning.* For respondent to employ a lawyer to defend his business from threatened destruction was 'normal'; it was the response ordinarily to be expected. Cf. Deputy v. Du Pont, 308 U.S. 488, 495, 84 L. ed. 416, 422, 60 S. Ct. 363; Welch v. Helvering, 290 U.S. 111, 114, 78 L. ed. 212, 214, 54 S. Ct. 8; Kornhauser v. United States, 276 U.S. 145, 72 L. ed. 505, 48 S. Ct. 219 supra. Since the record contains no suggestion that the defense was in bad faith or that the attorney's fees were unreasonable, the expenses incurred in defending the business can also be assumed appropriate and helpful, and therefore 'necessary'." (p. 471) (italics ours)
>
> "Upon being served with notice of the proposed fraud order respondent was confronted with a new business problem which involved far more than the right to continue using his old advertisements. He was placed in a position in which not only his selling methods but also the continued existence of his lawful business were threatened with complete destruction. So far as appears from the record respondent did not believe, nor under our system of jurisprudence was he bound to believe, that a fraud order destroying his business was justified by the facts or the law. *Therefore he did not voluntarily abandon the business but defended it by all available legal means. To say that this course of conduct and the expenses which it involved were extraordinary or unnecessary would be to ignore the ways of conduct and the forms of speech prevailing in the business world.*" (p. 472) (italics ours)

In the more recent case of *Lilly v. Commissioner*, 343 U.S. 90 (1952) the Supreme Court reaffirmed the

holding of the *Heininger* case that expenditures incurred in the interest of preserving the continuation of an existing method of business are ordinary and necessary beyond question.

The issue was whether an optician selling glasses to the public was entitled to deduct under Sec. 23(a) so-called "kick-backs" paid to the physicians who prescribed the glasses. Taxpayer paid the "kick-backs" because otherwise the physicians would have sent the patients to other opticians who paid the same or, on the other hand, the physicians would have filled the prescriptions themselves.

The Supreme Court, in reversing the Circuit Court and in holding in favor of the taxpayer, said with respect to the expenditures:

> "The transactions from which they arose were of common or frequent occurrence in the type of business involved. They reflected a nationwide practice. Consequently, they were 'ordinary' in the generally accepted meaning of that word." (p. 93)
>
> "The payments likewise were 'necessary' in the generally accepted meaning of that word. It was through making such payments that petitioners had been able to establish their business." (p. 93)
>
> "As has been said of legal expenses under somewhat comparable circumstances, 'To say that this course of conduct and the expenses which it involved were extraordinary or unnecessary would be to ignore the ways of conduct and the forms of speech prevailing in the business world'.

Commissioner v. Heininger, 320 US 467, 472 . . .". (p. 94)

" '. . . Without this expense, there would have been no business. Without the business, there would have been no income. Without the income, there would have been no tax. To say that this expense is not ordinary and necessary is to say that that which gives life is not ordinary and necessary'." (footnote 4, p. 94, quoted from Heininger v. Commissioner (CA 7th) 133 F 2d 567, 570)

In the *Lilly* case the Tax Court had affirmed the disallowance of the expenditure by the Commissioner. In reversing a similar affirmance by the Circuit Court of Appeals, the Supreme Court directed that the case be remanded to the Tax Court with instructions to set aside its judgment insofar as it was inconsistent with the Supreme Court's opinion.

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In the instant proceeding plaintiff taxpayers were engaged in the wholesale distribution of beer to retail customers. Had the Initiative been enacted, the State of Washington would have appropriated to itself the exclusive retail sale of beer; as a result plaintiffs would have lost all their existing customers.

In accordance with the holding of the Supreme Court in the *Heininger* and *Lilly* cases, the expenditures so incurred for the purpose of preserving the continuance of taxpayers' existing business, were "or-

dinary and necessary'' within the express language of Sec. 23(a)(1)(A), beyond question.

Application of the Regulation by the Commissioner to bar such expenditures as a deduction directly contravened Sec. 23(a)(1)(A) and was in excess of the rule-making authority of the Commissioner. *Manhattan General Equipment Company v. Commissioner,* 297 U.S. 129 (1936).

Therefore, the Regulation, ''to the extent'' its application ''conflicts with the meaning and purpose of'' Sec. 23(a)(1)(A), is unauthorized and invalid in accordance with the holding of the *Bingham* case.

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## III.

**THE REGULATION CANNOT BE VALIDLY APPLIED TO BAR THE EXPENDITURES AS A DEDUCTION ON THE GROUND THAT CONGRESS BY RE-ENACTING SECTION 23(a)(1)(A) THEREFORE IMPLIEDLY ADOPTED THE INSTANT APPLICATION OF THE REGULATION AS A PART OF SAID SECTION.**

The Revenue Code was re-enacted during the existence of the Regulation. The doctrine of statutory re-enactment cannot be invoked with respect to the instant application of the Regulation because: the Regulation itself has never been captioned and indexed under Sec. 23(a)(1)(A) but on the contrary for many years has been indexed or captioned under Sec. 23(o) or its predecessor Code sections; the Commissioner himself has publicly acquiesced in a Tax Court decision holding that expenditures incurred in connection with measures voted upon by the People

are deductible under Sec. 23(a). In any event the Supreme Court has held that the doctrine of statutory re-enactment can never be invoked where the application of a Regulation directly contravenes a section of the Revenue Code.

**(1) The theory of statutory re-enactment cannot be invoked because the Regulation itself has never been indexed or captioned under Section 23(a)(1)(A) but on the contrary has been indexed and captioned under Section 23(o) and predecessor Sections.**

The Regulation bears the heading "Sec. 29.23(o)-1. Contributions or gifts by individuals." The history of the Regulation shows that it has been so indexed and captioned ever since the provision regarding lobbying was inserted in the Regulation.

The reference to "23(o)" is a reference to the Section of the Revenue Code bearing the same number, relating to contributions to charitable, religious and educational organizations and bearing the similar title "Charitable and other contributions".

The context of the Regulation in a number of instances specifically refers to Sec. 23(o). Thus the index of the Regulation, the title of the Regulation and the text of the Regulation specifically refer to Sec. 23(o).

No part of the Regulation makes any specific numerical reference to Sec. 23(a)(1)(A).

The concept, history and purpose of Sec. 23(o) relating to the deduction of contributions to charitable, religious and educational organizations, as previously pointed out, is radically different from the concept,

history and purpose of Sec. 23(a)(1)(A) relating to the deductibility of ordinary and necessary expenses incurred in carrying on a business.

To impute to Congress an implied adoption of the Regulation as a part of Sec. 23(a)(1)(A) is therefore both unreasonable and fictional.

**(2) The Commissioner himself has construed the Regulation as not applicable to expenditures incurred for publicity in connection with measures voted upon by the People.**

The initial Regulation pertaining to corporations bore the title "Lobbying Expenses". The Regulation contained the identical phrase of the instant Regulation "for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda. . . ."

By giving the Regulation pertaining to corporations the title "Lobbying Expenses" the Commissioner plainly construed the words of the Regulation "the promotion or defeat of legislation" as partaking of the same flavor and construction as the word "lobbying" which appears as the opening word of the phrase.

It is also significant that the Supreme Court in the *Textile* case, hereafter considered by us in detail, also construed the same phrase of the Regulation pertaining to corporations as referring to "lobbying" expenses.

The term "lobbying" relates to exertion of influences upon representatives of the People in "legislative halls". Its meaning does not embrace the exercise by an individual of his right of free speech—

exerted publicly for the purpose of influencing a decision by the People at the polls.

In *U. S. v. Rumely,* 345 U.S. 41 (1953), the Supreme Court clearly defined the meaning of the word "lobbying". In that case the issue was whether a Committee of the House of Representatives authorized to investigate "all lobbying activities to influence, encourage, promote or retard legislation" could hold Rumely in contempt for refusal to answer questions regarding books which he sold to the *public.* In holding Rumely was not in contempt and that the questions were unauthorized, the Court said:

> "As a matter of English, the phrase 'lobbying activities' readily lends itself to the construction placed upon it below, namely, 'lobbying in its commonly accepted sense,' that is, 'representations made directly to the Congress, its members, or its committees,' 90 App DC 382, 391, 197 F 2d 166, 175, and does not reach what was in Chairman Buchanan's mind, attempts 'to saturate the thinking of the community.'" (p. 47)

In addition to the foregoing construction by the Commissioner of the phrase "for lobbying purposes, the promotion or defeat of legislation" as meaning "lobbying", the Commissioner by his continued published acquiescence in an important decision by the Tax Court next to be considered, has construed the the Regulation as not applicable to expenditures incurred for publicity in connection with measures voted upon by the People.

In *Luther Ely Smith v. Commissioner,* 3 T. C. 696 (1944) the issue was whether a taxpayer, a trial law-

yer, could deduct as an ordinary and necessary business expenditure, a contribution of $2500.00 made to an organization formed for the purpose of amending the Constitution of Missouri by a vote of the People. The proposed amendment provided that judicial candidates of the lower courts should be nominated by a Commission.

The evidence showed that taxpayer's trial practice had suffered under the existing method of selecting judges because his clients had lost confidence in the courts. The contribution was expended for publicity in support of the amendment in the form of radio broadcasting, literature and speeches. The amendment was adopted and being self-operative forthwith became law.

In allowing the deduction the Court held that the expenditures were ordinary and necessary business expenses under Sec. 23(a)(1)(A). The Court expressly stated that its conclusion was based upon the following premise: no lobbying was involved because the amendment was voted upon by the People. No reference was made by the Court to the Regulation because the Court obviously did not consider the Regulation as being applicable.

The Court said:

> "It should be noted that the institute engaged in no lobbying of any kind before any legislative body. No legislation was needed or involved in its plan. It contemplated an amendment to the constitution, proposed by the initiative of the people, voted upon at a general election, and be-

coming selfoperative thirty days thereafter, without the necessity of any action or approval by either the legislature or the governor." (p. 702)

The case was decided in 1944 and in the same year the Commissioner acquiesced in the decision, which acquiescence has never been withdrawn (Rev. Rul. 1944-24-11907-C.B. 1944).

**(3) In any event the theory of statutory re-enactment can never be invoked where the application of a Regulation contravenes the express language and meaning of a Section of the Revenue Code.**

In *Koshland v. Helvering,* 298 U.S. 441 (1936) the issue was whether taxpayer, the owner of preferred stock who had received a common stock dividend, could upon the sale of the preferred use as his cost basis for computation of income taxes the cost of the preferred without allocating any part of said cost to the common. Obviously if a part of the cost were allocated to the common stock, taxpayer's cost basis would have decreased and conversely his profit and taxes would have increased.

The Commissioner disallowed the claim of taxpayer on the ground that a Treasury Regulation expressly required allocation of a part of the cost to the common.

The pertinent section of the Revenue Code relating to the cost basis of stock had been re-enacted by Congress a number of times during the existence of a Regulation purporting to construe the Section.

The Supreme Court in reversing the Circuit Court of Appeals held that the successive re-enactments of the Code Section did not validate the Regulation as applied to the facts of the *Koshland* case because such application would have contravened the applicable section of the Revenue Code and therefore the Regulation was in excess of the rule-making authority of the Commissioner.

> "But we are told that Treasury Regulations long in force require an allocation of the original cost between the preferred stock purchased and the common stock received as dividend. And it is said that while no provision of the statute authorizes a specific regulation respecting this matter, the general power conferred by the law to make appropriate regulations comprehends the subject. Where the act uses ambiguous terms, or is of doubtful construction, a clarifying regulation or one indicating the method of its application to specific cases not only is permissible but is to be given great weight by the courts. And the same principle governs where the statute merely expresses a general rule and invests the Secretary of the Treasury with authority to promulgate regulations appropriate to its enforcement. But where, as in this case, the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation. *Congress having clearly and specifically declared that in taxing income arising from capital gain the cost of the asset disposed of shall be the measure of the income, the Secretary of the Treasury is without power by regulatory amendment to add a provision that income*

*derived from the capital asset shall be used to reduce cost."* (pp. 446-447) (italics ours)

The *Koshland* case has never been disproved and was generally approved in the following subsequent cases: *M. E. Blatt Co. v. U. S.,* 305 U.S. 267, 279 (1938); *Helvering v. Oregon Mutual Life Insurance Co.* 311 U.S. 267, 272 (1940); *Social Security Board v. Nierotko,* 327 U.S. 358, 369 (1946).

In the recent case of *Commissioner v. Glenshaw Glass Co.,* 348 U.S. 426 (1955) the Supreme Court expressly reaffirmed the ruling of the *Koshland* case in the following language:

> "It is urged that re-enactment of §22(a) without change since the Board of Tax Appeals held punitive damages nontaxable in Highland Farms Corp. v. Comissioner, 42 BTA 1314, indicates congressional satisfaction with that holding. Re-enactment—particularly without the slightest affirmative indication that Congress ever had the Highland Farms decision before it—is an unreliable indicium at best. Helvering v. Wilshire Oil Co. 308 U.S. 90, 100, 101, 84 L. ed. 101, 107, 108, 60 S. Ct. 18; Koshland v. Helvering, 298 U.S. 441, 447, 80 L. Ed. 1268, 1273, 56 S. Ct. 767, 105 ALR 756." (p. 431)

In *Jones v. Liberty Glass Company,* 332 U. S. 524 (1947), the Supreme Court said:

> "Since Congress has subsequently convened from time to time and has amended §322 in other respects without expressly disapproving this interpretation, the contention is advanced that leg-

islative acquiescence in the interpretation must be assumed. But the doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions." (pp. 533-534)

"We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation. In short, the original legislative language speaks louder than such judicial action." (p. 534)

In *Louisville & N.R. Co. v. U. S.,* 282 U.S. 740 (1931) Chief Justice Hughes, speaking for the Court, in holding a Regulation of the Interstate Commerce Commission invalid despite repeated subsequent reenactments of the Interstate Commerce Act by Congress, said:

"The act has been repeatedly amended, and has been re-enacted, without any change directed to the correction of this practice (i.e.: Interstate Commerce Commission Regulations). It is strongly urged that in the light of these circumstances the administrative construction should be determinative. . . ." (p. 757)

"Long-continued practice and the approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a statute, *but cannot alter provisions that are clear and explicit when related to the facts disclosed.* . . ." (p. 759) (italics ours)

See also *Texas & P. R. Co. v. U. S.,* 289 U.S. 627, 640 (1933) and *U. S. v. Missouri P. R. Co.,* 278 U.S., 269, 279-280 (1929).

The reasoning behind the view that legislative re-enactment can never confer validity upon an administrative regulation which clearly goes beyond the boundaries marked out by the Statute is aptly set forth in *Studies in Federal Taxation, Third Series* by Randolph E. Paul, former Tax Advisor to the Secretary of Treasury, wherein the following statement appears:

> "The most familiar limitation upon the doctrine of re-enactment is the qualification that if the regulation definitely goes beyond the limits of the statute, no amount of legislative re-enactment will validate the ruling. *To hold otherwise would mean that taxpayers could never rely upon the clearest terminology of a statute.* A regulation which does not carry into effect the will of Congress as expressed in the statute, and which operates to create a rule out of harmony with the statute, is 'a mere nullity'." (p. 435) (italics ours)

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The expenditures here in question incurred in preserving the continuance of an existing business were "ordinary and necessary" within the express language of Sec. 23(a)(1)(A) beyond question. *Commissioner v. Heininger,* 320 U.S. 467; *Lilly v. Commissioner,* 343 U.S. 90.

The Regulation "to the extent" it bars such expenditures as a deduction directly contravenes Sec. 23(a)(1)(A) and its application therefore is invalid. *Bingham's Trust v. Commissioner,* 325 U.S. 365, 377.

Application of the Regulation to such expenditures "is a mere nullity". *Manhattan General Equipment Company v. Commissioner,* 297 U.S. 129, 134.

The doctrine of statutory re-enactment—that Congress in re-enacting Sec. 23(a)(1)(A), impliedly and in direct contravention of the language of said section adopted such administrative "nullity" by the Commissioner as a part of Sec. 23(a)(1)(A)—cannot therefore be invoked.

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## IV.

### THE REGULATION CANNOT BE VALIDLY APPLIED ON THE GROUND OF PUBLIC POLICY TO BAR THE EXPENDITURES AS A DEDUCTION UNDER SEC. 23(a)(1)(A).

**(1) Disallowance of expenditures as a deduction on the ground of public policy can only be justified where expenditures violate sharply defined national and state policies proscribing particular types of conduct.**

It is important to first consider in detail a decision by the Supreme Court wherein the Court on the ground of public policy upheld the disallowance by the Commissioner of the deduction of certain expenditures incurred for "lobbying".

In *Textile Mills Sec. Corp. v. Commissioner,* 314 U.S. 326 (1941) the issue was stated by the Court as follows:

> ". . . whether petitioner may deduct under the Revenue Act of [May 29] 1928 (45 Stat. at L. 791, chap. 852, 26 USCA Int. Rev. Acts, 1940 ed. p. 345) certain expenses incurred by it under contracts in connection with the presentation of

> claims to Congress on behalf of former enemy aliens for the procurement and enactment of amendatory legislation authorizing the payment of the claims." (p. 327).

Taxpayer, a corporation, had entered into contracts with alien German textile interests for the prosecution of claims and the enactment of legislation for recovery of their property which had been seized in World War I. The contracts were contingent; taxpayer was to receive compensation, which was fixed at a percentage of the recovery, only if the legislation was enacted and in any event was to bear all costs and expenses.

Taxpayer was organized primarily for the purpose of procuring the enactment of such legislation and in the course of its campaign employed the services of a publicist and two legal experts.

Taxpayer was successful in procuring the enactment of the legislation, which was in the form of a monetary award. Taxpayer sought to deduct the expenses for the services previously referred to under Sec. 23(a) as an ordinary and necesssary business expense.

The expenditures were incurred in 1929 and 1930 and deducted in the computation of net taxable income for those years. A net loss for those years was carried forward and applied against 1931 income.

Art. 262 of Reg. 74, issued in connection with the 1928 Revenue Act as amended, was entitled "Donations by corporations" and provided:

"Corporations are not entitled to deduct from gross income contributions or gifts which individuals may deduct under §23(n). Donations made by a corporation for purposes connected with the operation of its business, however, when limited to charitable institutions, hospitals, or educational institutions conducted for the benefit of its employees or their dependents are a proper deduction as ordinary and necessary expenses. Donations which legitimately represent a consideration for a benefit flowing directly to the corporation as an incident of its business are allowable deductions from gross income. For example, a street railway corporation may donate a sum of money to an organization intending to hold a convention in the city in which it operates, with the reasonable expectation that the holding of such convention will augment its income through a greater number of people using the cars. *Sums of money expended for lobbying purposes, the promotion or defeat of legislation,* the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income." (pp. 336-337) (italics ours)

The Supreme Court, in reversing the Circuit Court of Appeals, held on the ground of public policy that the Regulation could be validly applied to bar the expenditures by taxpayer corporation as a deduction under Sec. 23(a) relating to ordinary and necessary business expenses.

The opinion is short; the quotations hereafter set forth constitute the entire body of the Court's opinion relative to the issue previously stated.

The opinion is divided into two parts, which we will now consider: first, the Court considered whether under the facts the Regulation was applicable to Sec. 23(a) and secondly, if so, whether its application was valid.

(1) In determining whether the Regulation was applicable to the particular expenditures under Sec. 23(a), relating to the deductibility of ordinary and necessary business expenses incurred by a corporation, the Court said:

> "Plainly, the regulation was applicable. *The ban against deductions of amounts spent for 'lobbying' as 'ordinary and necessary' expenses* of a corporation derived from a Treasury Decision in 1915. T. D. 2137, 17 Treas. Dec. Int. Rev. pp. 48, 57, 58. That prohibition was carried into Art. 143 of Treasury Regulations 33 (Revised, 1918) under the heading of 'Expenses' in the section on 'Deductions'.[16] Beginning in 1921 the regulation was entitled 'Donations.' (Art. 562, Treasury Regulations 45.) And in the regulations here in question Art. 262 appeared under §23(n) which covered 'Charitable and other contributions' by individuals. It assumed that form and content in 1921 and appeared since then without change in all successive regulations. Section 23(n) and §23(a) both deal with deductions; and a 'donation' by a corporation though not deductible under the former might be under the latter. Article 262 purports to specify when a certain type of expenditure or donation by a corporation may or may not be deducted as an 'ordinary and necessary' expense. The argument that it was not applicable because it was not specifically incor-

porated under §23(a) is frivolous." (pp. 337-338) (italics ours)

In setting forth the history of the Regulation in the paragraph of the opinion previously quoted, the Court, in footnote 16, in turn quoted in full Art. 143, Reg. 33, the initial Regulation bearing the caption "Lobbying Expenses" and containing the same language relating to expenditures "for lobbying purposes, the promotion or defeat of legislation. . . ."

*Comment:*

It is all important to note that the Court at the very outset of the paragraph previously quoted in referring to the text of the Regulation "lobbying purposes, the promotion or defeat of legislation. . . ." characterized the provision as a *"ban* against deductions of amounts spent for *'lobbying'* . . ." (italics ours).

Footnote 16 of the quotation indicates that the Treasury, in initially publishing the corporate Regulation under the caption "Lobbying Expenses" gave the same characterization to the phrase "lobbying purposes, the promotion or defeat of legislation. . . ."

The Court held that the very use of the language "ordinary and necessary expenses" in the Regulation plainly indicated that the Regulation was referable to Sec. 23(a). Furthermore Sec. 23(a) was the only possible section under which the Regulation relating to corporations could fall because Sec. 23(n) referred to, related only to individuals and Sec. 23(q) relating to charitable and other donations by corporations was not

enacted until 1936—five years later. (The Regulation pertaining to individuals, indexed and captioned under Sec. 23(n) "Charitable and other contributions", contained neither the foregoing language nor the provision against lobbying. See Appendix for text of said Regulation and also as amended in 1938 by the inclusion of said lobbying provision.)

(2) The Court, in holding that the application of the Regulation to the expenditures so incurred for *"lobbying"* was valid, said:

> "Petitioner's argument that the regulation is invalid likewise lacks substance. The words 'ordinary and necessary' are not so clear and unambiguous in their meaning and application as to leave no room for an interpretative regulation. The numerous cases which have come to this Court on that issue bear witness to that, Welch v. Helvering, 290 U.S. 111, 78 L ed 212, 54 S Ct 8; Deputy v. DuPont, 308 U.S. 488, 84 L ed 416, 60 S Ct 363, and cases cited. *Nor has the administrative agency usurped the legislative function by carving out this special group of expenses and making them non-deductible.* We fail to find any indication that such a course contravened any Congressional policy. *Contracts to spread such insidious influences through legislative halls have long been condemned.* Trist v. Child (Burke v. Child) 21 Wall. (US) 441, 22 L ed 623; Hazelton v. Sheckells, 202 US 71, 50 L ed 939, 26 S Ct. 567, 6 Ann Cas 217. Whether the precise arrangement here in question would violate the rule of those cases is not material. The point is that the general policy indicated by those cases need not be disregarded by the rule-making authority in

its segregation of non-deductible expenses. *There is no reason why, in absence of clear Congressional action to the contrary, the rule-making authority cannot employ that general policy in drawing a line between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction.* The exclusion of the latter from 'ordinary and necessary' expenses certainly does no violence to the statutory language. The general policy being clear it is not for us to say that the line was too strictly drawn." (pp. 338-339) (italics ours)

*Comment:*

In stating that the administrative agency had not usurped the legislative function by carving out "this special group of expenses and making them non-deductible", the Court plainly was referring to "lobbying" expenditures—the characterization given such expenditures in the previous paragraph of the Court's opinion.

Both cases, *Trist v. Child* and *Hazelton v. Sheckells,* cited by the Court in support of its statement that "contracts to spread such insidious influences through *legislative halls* have long been condemned" were cases: involving contingent fee contracts for the enactment of legislation by means of "lobbying" in *"legislative halls"*. The Supreme Court in each of said cases held the contracts unenforceable on the ground of public policy. (italics ours)

The Court in the *Textile* case plainly stated that the application of the Regulation to bar the expenditures was based upon public policy as declared by the

Court in the *Trist* and *Hazelton* cases. The Court, however, in a footnote (f.n. 18, p. 338) made a passing and incidental reference to the fact that Congress in 1936 in enacting Sec. 23(q) of the Code relating to the deduction by corporations of contributions to charitable, religious and educational organizations, inserted a proviso that no substantial part of the activities of such organization shall be carrying on propaganda, or otherwise attempting, to influence legislation. The reference was not intended to have any significance other than one of passing interest because the transactions involved in the *Textile* case took place in 1929-1931, at least five years prior to the amendment referred to. Furthermore, as previously pointed out in this brief, the purpose and concept of the distinct sections of the Revenue Code relating to contributions by corporations and individuals to charitable, religious and educational organizations are radically different from the purpose and concept of Sec. 23(a)(1)(A) relating to business expenses.

In any event the Court made it crystal clear that the public policy which the Court was referring to was the public policy declared by the *Trist* and *Hazelton* cases. The Court said:

> "The point is that the *general policy* indicated by *those cases* need not be disregarded by the rule-making authority in its segregation of non-deductible expenses". (italics ours)

The Court subsequently reiterated the limited scope of the public policy declared in those cases by stating that it saw no reason why "the rule-making authority

cannot employ that general policy in drawing a line between legitimate business expenses and those arising from *that family of contracts* to which the law has given no sanction" (italics ours). The reference to "that family of contracts" is to contracts referred to in the cases cited, which were for the enactment of legislation on a contingent fee basis involving "lobbying" in "legislative halls".

Thus the decision of the Supreme Court in the *Textile* case, giving it the broadest scope possible, may be summarized as holding: that the Regulation may be validly applied on the ground of public policy to bar certain types of expenditures incurred for "lobbying" in "legislative halls".

The Supreme Court in two subsequent decisions confirmed the same limited construction of its previous holding in the *Textile* case.

In *Commissioner v. Heininger,* 320 U.S. 467 (1943), previously considered, the issue was whether: expenditures incurred by a mail order dentist in unsuccessfully resisting a fraud order of the Postmaster General were ordinary and necessary business expenses and also whether the allowance of the expenditures as a deduction would violate public policy.

In holding that the allowance of the expenditures would not violate public policy, the Court said:

> "The Bureau of Internal Revenue, the Board of Tax Appeals, and the federal courts have from time to time, however, narrowed the generally accepted meaning of the language used in §23(a) in order that tax deduction consequences might

not frustrate sharply defined national or state policies proscribing particular types of conduct. A review of the situations which have been held to belong in this category would serve no useful purpose for each case should depend upon its peculiar circumstances. A few examples will suffice to illustrate the principle involved. Where a taxpayer has violated a federal or a state statute and incurred a fine or penalty he has not been permitted a tax deduction for its payment. *Similarly, one who has incurred expenses for certain types of lobbying and political pressure activities with a view to influencing federal legislation has been denied a deduction.*[9]" (italics ours) (p. 473)

Footnote 9 in the previous quotation cites the *Textile* case in support of the statement which has been italicized.

In connection with the statement that public policy can be invoked only where to allow the deduction would violate "sharply defined national or state policies proscribing particular types of conduct" the Court said:

> "The language of §23(a) contains no express reference to the lawful or unlawful character of the business expenses which are declared to be deductible." (p. 474)

It is pertinent to note that in 1913 at the time the original bill enacting the income tax law was debated in the Senate, Senator Sterling proposed an amendment that any deduction of expenses and losses should be incurred in "legitimate trade". The amendment

was vigorously opposed and rejected. Senator Williams, a ranking member of the Finance Committee who was in charge of the bill, in reply to the proposed amendment, pointed out that the object of the bill was to tax income: "It is not to reform men's moral characters; that is not the object of the bill at all." (Vol. 50 Cong. Rec., p. 3849 et seq. (1913) )

In the recent case of *Lilly v. Commissioner,* 343 U.S. 90 (1952) previously considered, the issue was whether "kick-backs" paid by a dispensing optician were ordinary and necessary business expenses and further whether an allowance of the expenditures as a deduction would violate public policy.

The Supreme Court in holding that allowance of the deduction would not violate public policy said:

> "In Textile Mills Securities Corp. v. Commissioner, 314 US 326, 86 L ed 249, 62 S Ct 272, this Court accepted an interpretation of that section by a Treasury Regulation which disallowed the deduction of *certain expenditures for lobbying purposes.* In doing so, the Court referred to the fact that some types of lobbying expenditures had long been condemned by it. . . ." (p. 95) (italics ours)

The Court then quoted from the *Heininger* case with italics supplied by the Court as follows:

> "It refers to the narrowing of 'the generally accepted meaning of the language used in §23(a) in order that tax deduction consequences *might not frustrate sharply defined national or state policies* proscribing particular types of conduct.' (Emphasis supplied.)" (p. 96)

In holding that an allowance of the deduction would not violate public policy the Court said:

> "The policies frustrated must be national or state policies evidenced by some governmental declaration of them." (p. 97)

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Thus the Supreme Court in the *Heininger* and *Lilly* opinions clearly reiterated the limited holding of the *Textile* case to the *facts* before the Court in that case: that the Regulation could be validly applied on the ground of public policy to bar as a deduction certain types of expenditures for "lobbying" in "legislative halls" referred to in the *Textile* case.

The gross error of extending statements by the Supreme Court to different facts in a different setting was the subject of sharp comment by the Supreme Court in *Armour & Co. v. Wantock,* 323 U.S. 126 (1944), where the Court said:

> "It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion . . . General expressions transposed to other facts are often misleading." (pp. 132-133)

It is all important to bear in mind that the issue in this case is not the issue whether the Regulation is valid as an abstraction. The issue on the contrary is the specific question whether the Regulation can be validly applied to the expenditures in question. Whether the Regulation may be validly applied to

other and different expenditures under different circumstances is not in issue.

It is also important to note that the Supreme Court in the *Heininger* case held that the question whether expenditures can be disallowed on the ground of public policy turns on the facts of each particular case. In referring to "sharply defined national or state policies proscribing particular types of conduct" the Supreme Court said:

> "A review of the situations which have been held to belong in this category would serve no useful purpose for each case should depend upon its peculiar circumstances." (p. 473)

We therefore come to the next question: whether a deduction of the expenditures in question could violate any conceivable public policy.

**(2) The expenditures here incurred for publicity in connection with an Initiative Measure voted upon by the People did not violate any conceivable public policy but on the contrary were in the interests of public policy.**

The expenditures here incurred were not "for lobbying" in "legislative halls" — the expressions used in the *Textile* case. The term "lobbying", said the Supreme Court in *U. S. v. Rumely,* 345 U.S. 41 (1953) "does not reach what was in Chairman Buchanan's mind, 'attempts to saturate the thinking of the community'." (p. 47)

The expenditures were incurred by plaintiff taxpayers, as individuals, for publicity directed to the People, in the exercise of their right of free speech

and for the purpose of preserving the continuance of their existing business.

The ballot title of the Initiative Measure submitted to the People of Washington at the General Election held November 2, 1948 was: "An Act prohibiting the retail sale of beer and wine by any person other than the State of Washington, repealing all provisions of existing law pertaining to licensing of retail sale of beer and wine, revoking existing licenses and providing penalties." (TR. 45)

The State of Washington expressly declared as a matter of public policy that information for and against the Initiative should be given to the public. State law provided that proponents and opponents of the Initiative had the right to present their views to the public in a pamphlet containing a copy of the Initiative mailed by the State to all voters prior to the election; the cost of printing such arguments to be paid for by the parties so presenting their views (Revised Code of Washington, Sec. 29.79.340) (TR. 92-101).

Opponents of the Initiative, accordingly, at their expense, availed themselves of the opportunity so afforded by law to present their views. Taxpayers, together with others, supplemented that presentation to the public by making the expenditures here in question and for the following purposes:

> "A. Well, the principal activity was newspaper advertising and radio broadcasting. There were large quantities of literature distributed through various channels." (TR. 115)

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> "The Witness: It was directed as a means of educating the public as to the nature of the initiative measure which they would otherwise not know.
>
> The Court: All with the view of procuring its non-adoption?
>
> The Witness: That is right." (TR. 116)

The District Court in its oral decision expressly held that the expenditures did not violate any public policy and on the contrary held that the expenditures were in the public interest:

> "It is admitted in the record that the sums here in question were spent by the taxpayer for the purpose of defeating the enactment of certain legislation by initiative and that being so, those sums are not deductible from gross income. This is not to indicate that there is anything evil or corrupt about spending money for these purposes. Quite the contrary. The expenditure of money to enlighten and inform the public with respect of initiative measures is a perfectly proper and laudable activity. When the general public are called upon to enact or refuse to enact legislation, the more information they are given and the more widespread it is distributed the better. Certainly neither this taxpayer nor the Washington Brewers Institute nor the brewing industry are in any manner to be criticized for having spent the money to defeat the legislation by fair publicity. They had a right to do that and propriety of expenditures therefor is not in question. But that has nothing whatever to do with whether the sums so spent by the taxpayer are deductible for income tax purposes. In that

matter the regulation is controlling and clearly requires judgment in favor of defendant. So ordered.'' (TR. 29-30) (Complete oral opinion of the Court is set forth in the Appendix) (See also Conclusion of Law No. 2 to the same effect—TR. 35).

In our research of the cases on public policy we were unable to find a single case even intimating that expenditures incurred in informing the People regarding a measure submitted to their vote are against public policy. On the contrary, information given in the exercise of the right of free speech guaranteed by the Constitution is protected and encouraged by the law to the fullest extent. The potential evils involved in connection with certain expenditures incurred in ''lobbying'' in ''legislative halls'' simply do not and cannot exist where an open appeal is made directly to the People with respect to a measure submitted to a vote of the People.

The Commissioner himself by his published acquiescence in the *Luther Ely Smith* case, previously referred to, has expressly recognized that such expenditures made in connection with a measure voted upon by the People do not violate any public policy. It is significant that the acquiescence by the Commissioner in the *Luther Ely Smith* case was announced subsequent to the decision in the *Textile* case and has not been withdrawn.

The Supreme Court in the *Textile* case clearly only construed the Regulation pertaining to corporations as applicable to certain types of expenditures incurred

for "lobbying" in "legislative halls". In the subsequent *Heininger* and *Lilly* cases the Supreme Court clearly reaffirmed such construction.

And see *Steele v. Drummond,* 275 U.S. 203, 205, 206 (1927) where the Supreme Court clearly pointed out that of the various types of activities engaged in to influence passage of legislation, only certain categories of activities are against public policy: the obtaining of legislative action "as a matter of favor by means of personal influence, solicitation and the like, or by other improper or corrupt means."

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## V.

**AUTHORITIES CITED BY THE DISTRICT COURT: THE ULTIMATE DECISIONS OF SAID CASES ARE NOT NECESSARILY INCONSISTENT WITH THE DECISIONS OF THE SUPREME COURT PREVIOUSLY CITED.**

The District Court in support of its Conclusions of Law and in its Opinion, cited a number of decisions by the lower courts, including two decisions by the U. S. Court of Appeals for the Ninth Circuit (TR. 27, 47-48; See Appendix).

These cases will now be considered in the same order in which they have been cited by the District Court.

*Old Mission Portland Cement Co. v. Commissioner,* 69 F. 2d 676 (9th Cir. 1934):

The Regulation was not considered by the Court. The issue was whether taxpayer, engaged in manu-

facturing cement in California, could deduct $3,000.00 contributed in 1926 "to promote a state-wide referendum for an increased gasoline sales tax levy in order to provide additional funds for road building." (p. 677)

The referendum was successful and large quantities of cement were used for additional roads of which taxpayer supplied a part.

The opinion does not indicate how the contribution was expended except to note that the contribution was listed on taxpayer's books as "All California Highway Lobbying $3,000." (p. 681)

The Circuit Court affirmed the Board of Tax Appeals, which Board in turn had affirmed a disallowance of the contribution by the Commissioner.

The opinion of the Court deals with a number of other transactions from which an appeal was also taken. The Court disposed of the issue relating to the contribution with the brief statement that it "is not such an outlay as constitutes an ordinary and necessary business expense." (p. 681)

*Comment — Old Mission case:*

The following aspects of the contribution so made are significant: (1) The contribution only remotely and indirectly affected taxpayer's business. Thus if the referendum were enacted, taxpayer might or might not get some business depending upon other conjectural factors such as price and terms; (2) Taxpayer's books listed the contribution as "Lobbying"

and taxpayer testified that the term so used was correct. The Opinion does not indicate how the money was actually expended.

In view of the foregoing features of the contribution, the Circuit Court was justified in upholding the factual finding of the Board of Tax Appeals that the contribution was not an ordinary and necessary business expense. The Regulation was not mentioned.

*Sunset Scavenger Co. v. Commissioner*, 84 F. 2d 453 (9th Cir. 1936):

A Regulation pertaining to corporations containing a provision with respect to lobbying, the promotion or defeat of legislation was before the Court. The following facts of the case appear collectively in the opinion of the Circuit Court, in the opinion of the Board of Tax Appeals and from an examination of the records of the case.

Taxpayer was engaged in the business of collecting garbage in San Francisco. In 1927 taxpayer expended $34,485.00 in opposing an ordinance submitted to the voters of San Francisco in the form of an Initiative which would have permitted additional garbage licenses upon the request of a specified number of householders in a given area. The method of licensing provided in the measure was in addition to the existing method of licensing.

In 1929 taxpayer expended the sum of $1600.00 in connection with a number of propositions submitted by the Board of Supervisors to the voters as "Dec-

larations of Policy". The propositions so submitted inquired whether the voters were in favor of the municipal collection of garbage. The expression of "policy" by the voters was subject to rejection or acceptance by the Board of Supervisors of San Francisco, who independently were authorized under law to pass on the question whether legislation for the municipal collection of garbage should be enacted.

The monies in both years were expended in printing and distribution of pamphlets, newspaper advertising and in engaging speakers.

The opinion of the Circuit Court in reversing the allowance of the expenditures by the Board of Tax Appeals may be summarized as follows: (1) after referring to Sec. 234(a)(1) (the predecessor of Sec. 23(a) ), the Court without further consideration of said Section held the Regulation was applicable; (2) the Court observed that reenactment of the Revenue Code during the existence of the Regulation was indicative that the Regulation was not inconsistent with the statute; (3) the Court concluded its opinion with the statement that its holding was in accord with the *Old Mission* case.

*Comment — Sunset case:*

(1) It will be observed that the expenditures incurred in 1927 in the sum of $34,485.00 were used to combat an ordinance providing for an alternative method of licensing scavengers which was supplemental to the existing method of licensing. Whether, and to what extent, the taxpayer upon the enactment

of the ordinance would have lost business because of greater facility in the issuance to competitors of licenses under the ordinance, was conjectural and dependent upon future events. Therefore, enactment of the ordinance in itself did not directly and immediately affect taxpayer's business or its method of doing business.

The expenditure of $1600.00 in 1929 related to a measure which was not an ordinance but instead a declaration of policy which the Board of Supervisors thereafter could accept or reject. Adoption of the measure therefore did not directly or immediately affect taxpayer's business. The ultimate target of the expenditures incurred for publicity may, therefore, be said to have been legislative action by the Board of Supervisors.

In view of the conjectural and indirect effect of the adoption of both the measures upon taxpayer's business, the facts of the *Sunset* case are quite different from the facts of the instant case where it is clear and beyond question that taxpayers, upon the adoption of the Initiative, would have forthwith lost all their existing customers. Thus the facts in the *Sunset* case did not raise any clear-cut test whether the Regulation pertaining to corporations could be validly applied. Furthermore the Court did not have before it the benefit of the holdings of the Supreme Court in the subsequent *Heininger* and *Lilly* cases: that expenditures incurred in preserving the continuance of an existing business are ordinary and necessary with-

in the meaning of Sec. 23(a)—beyond question. Nor did the Court have the benefit of the holding of the Supreme Court in the subsequent *Textile* case.

(2) With respect to the reenactment of the Revenue Code during the existence of the Regulation, as indicative of implied Congressional adoption of the Regulation, it is significant to note that the Court added the all-important qualification to its statement on that subject: ". . . unless, perhaps, the language of the act is unambiguous and the regulation clearly inconsistent with it." (p. 457)

It should also be noted that the provision with respect to lobbying was not included in the Regulation pertaining to individuals until some nine years after the occurrence of the facts in the *Sunset* case.

(3) The Court in conclusion rested its final decision upon its prior holding in the *Old Mission* case in the following language: "This conclusion *is in accord with Old Mission Portland Cement Co. v. Commissioner* (C.C.A. 9) 69 F. (2d) 676, affirmed on other issues, Old Mission Portland Cement Co. v. Helvering, 293 U.S. 289, 55 S. Ct. 158, 79 L. Ed. 367." (p. 457) (italics ours)

We previously pointed out that the facts in the *Old Mission* case justified a decision by the Circuit Court upholding the finding of the Board of Tax Appeals that the expenditures were not ordinary and necessary. *In supporting its final conclusion on the authority of the Old Mission case, where no Regulation was considered or mentioned, the Court in the Sunset case*

*plainly indicated that it found the expenditures were not ordinary and necessary aside from any application of the Regulation.* On that issue it may well be contended as previously stated that the facts did not clearly show that the expenditures were ordinary and necessary beyond question.

(4) Neither the opinion of the Circuit Court nor the Board of Tax Appeals indicates that the measures were submitted to the voters. Only a search of the records disclosed that the measures were submitted to the voters. The Circuit Court apparently did not regard that feature of the case as significant. The opinion nowhere mentions the subject of public policy. The Court of course did not have the benefit of the subsequent holding by the Supreme Court in the *Textile* case (affirmed in the subsequent *Heininger* and *Lilly* cases) wherein the Court upheld the validity of the Regulation pertaining to corporations, on the ground of public policy only, as applied to the facts before it: certain types of expenditures incurred for "lobbying" in "legislative halls". Nor did the Court have the benefit of the holding of the Supreme Court in the subsequent *Rumely* case that the term "lobbying" does not include publicity directed to the People. Also, the acquiescence of the Commissioner in the *Luther Ely Smith* case, wherein the Tax Court held that expenditures incurred in connection with measures voted upon by the People were deductible, was first published by the Commissioner in 1944—long after the decision in the *Sunset* case.

*Roberts Dairy Co. v. Commissioner,* 195 F. 2d 948 (8th Cir. 1952):

The Regulation pertaining to corporations was before the Court. The issue was whether taxpayer, engaged in the distribution of milk, could deduct contributions to the National Tax Equality Association. Taxpayer was in competition with cooperative dairies who unlike taxpayer were exempt as legal entities from income taxes. The Association was incorporated to conduct "educational, scientific and research activities . . ." and as such had obtained a tax exemption.

Congress in 1943 enacted legislation revising the income tax laws, lessening the tax advantages accorded cooperatives. The Association incurred expenditures for the purpose of persuading Congress to enact the legislation. The Association in its reports to members claimed the legislation had been enacted through its efforts.

The Circuit Court, in affirming the Tax Court, held: (1) The work of the Association "was to persuade congress and legislatures" to remove tax disparities; (2) the Court then, without elaboration or citation of any authority stated that the contribution was not deductible "within the meaning of §23(q)(2) of the Internal Revenue Code and §29.23(q)-1 of Treasury Regulation 111." (p. 950) (the section of the Revenue Code so referred to relates to the deduction of religious, charitable, scientific, educational and similar contributions by corporations.)

Our comment regarding the *Roberts Dairy* case is combined with our comment with respect to a companion case which will be considered next.

*American Hardware & Equipment Co. v. Commissioner,* 202 F. 2d 126 (4th Cir. 1953):

Here again the issue was whether contributions to the National Tax Equality Association were deductible. The facts were the same as the facts in the *Roberts Dairy* case except that taxpayer was in the hardware business.

In affirming the decision of the Tax Court, the Circuit Court stated: (1) that the contributions were neither deductible under "Sec. 23(n)" (sic) as "scientific or educational" contributions, nor as a business expense under Sec. 23(a); (2) the Court referred to the Regulations and stated that the Supreme Court in the *Textile* case had held the Regulation applicable to such expenditures.

*Comment—Roberts Dairy and American Hardware cases:*

In each of said cases the expenditures were incurred in connection with legislation pending in "legislative halls". In considering the issue involved in the instant appeal, it is not necessary to consider further whether the expenditures so incurred were within "certain types of lobbying" expenditures, which should be disallowed as a deduction on the ground of public policy, referred to by the Supreme Court in the

*Heininger* and *Lilly* cases in construction of the holding of the Court in the *Textile* case. It is significant that the Circuit Courts in the *Roberts Dairy* and *American Hardware* cases failed to mention the decisions by the Supreme Court in the *Heininger* and *Lilly* cases.

*Revere Racing Association v. Scanlon,* 137 F. Supp. 293 (D. Mass. 1955):

The question was: whether taxpayer, engaged in operating a dog racetrack, could deduct expenditures made to persuade voters at a General Election to approve dog betting for an additional four years. The law provided for an election every four years as to whether dog betting should legally be permitted.

The Court after referring to the Regulation pertaining to corporations indicated that the expenditures were barred by the Regulation. The Court then stated:

> "Even if the activities of the plaintiff did not come within Treasury Regulation 111, Sec. 29.23 (q)-1, I think that they cannot properly be classified as proper business deductions under Section 23(a)(1)(A) of the Internal Revenue Code of 1939." (p. 294)
>
> "These expenses were not the expenses of doing business in any sense of the word, but were to put the voters in a frame of mind that would give them a possible opportunity to do business later." (p. 294)

The decision was appealed to the Circuit Court of Appeals, which decision we will now consider (not

cited, however, by the District Court in its Conclusions of Law and Opinion in the instant proceeding).

In *Revere Racing Association v. Scanlon,* 232 F. 2d 816 (1st Cir. 1956), the Circuit Court, in affirming the District Court stated: (1) The expenditures incurred were similar to those incurred in *McDonald v. Commissioner,* 323 U.S. 57 (1944), wherein a distinction was drawn between expenditures incurred in being a Judge and expenditures incurred by a Judge in endeavoring to be re-elected. The Court pointed out that the expenditures incurred by taxpayers were for the following purpose: "to put the voters in a frame of mind that would give them a possible opportunity to do business later." (p. 818) The Court of course was plainly referring to the fact that taxpayer's license to engage in dog racing was dependent upon a vote by the voters every four years. The Court said: "Accordingly we believe the McDonald decision controls the instant case." (p. 818) (2) The Court then said it likewise agreed with the lower Court that the Regulation applied even though the expenditures were made to influence voters rather than members of the legislature, citing the *Textile* case.

*Comment—Revere case:*

(1) In *McDonald v. Commissioner,* supra, upon which the Circuit Court based its opinion, the expenditures were made by a Judge in campaigning for re-election. In holding the expenditures so made were not deductible the Supreme Court first pointed out that

Sec. 48(a) of the Revenue Code expressly provided that the performance of a judicial office is a trade or business and that, accordingly, Sec. 23(a), allowing the deduction of ordinary and necessary expenses in carrying on a business was applicable. The Court said:

> "But his campaign contributions were not expenses incurred in being a judge but in trying to be a judge for the next ten years." (p. 60)

The expenditures incurred in the *Revere* case in the course of a mandatory election held every four years for the purpose of determining whether taxpayer could engage in dog racing for the ensuing four-year period, were no different than the expenditures incurred in the *McDonald* case for the purpose of being re-elected a Judge.

In contrast, in the instant case taxpayers had a present right to continue in business indefinitely. Thus taxpayers' expenditures were incurred in preserving and carrying on an "existing" business rather than in seeking to engage in a future business.

(2) The statement by the Court that it likewise agreed with the lower Court that the Regulation was applicable although the expenditures were made to influence voters rather than legislators, was admittedly dictum because the Court expressly stated that the *McDonald* decision *"controls the instant case"*. (p. 818) (italics ours)

In any event for reasons herein previously stated, the statement of the Court that the Regulation could

be properly applied to expenditures incurred to influence voters is not supported by the *Textile* case. The Court in the *Textile* case clearly pointed out that the application of the Regulation to the expenditures there considered was based on public policy: requiring the disallowance of certain types of expenditures incurred for "lobbying" in "legislative halls". The Supreme Court in the subsequent *Heininger* and *Lilly* cases clearly reaffirmed said construction of the *Textile* case and further held that the public policy barring the deduction must be sharply defined public policy—proscribing particular types of conduct. Those two later decisions by the Supreme Court were not considered in the *Revere* case. The Supreme Court further held in the *Rumely* case that "lobbying" does not embrace an appeal made directly to the People.

In addition, the foregoing statement by the Court in the *Revere* case was inconsistent with the published acquiescence of the Commissioner in the *Luther Ely Smith* case, which latter case was not mentioned by the Court.

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Thus the ultimate decisions of the cases cited by the District Court in its Conclusions of Law and Opinion are not necessarily in conflict with the final conclusion expressed in this brief. To the extent, however, that any statements appear in the opinions of

those decisions to the contrary, such statements must yield to the superior authority of the Supreme Court decisions previously considered.

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## CLOSING SUMMARY AND CONCLUSION.

The Regulation cannot be validly applied to bar the expenditures here incurred as a deduction under Sec. 23(a)(1)(A) on the basis of any of the three only justifiable grounds for any possible valid application of the Regulation:

**(1) The Regulation cannot be validly applied on the ground that its application falls within the authorized rule-making authority of the Commissioner.**

"He was placed in a position in which not only his selling methods but also the continued existence of his lawful business were threatened with complete destruction. . . . It is plain that respondent's legal expenses were both 'ordinary and necessary' if those words be given their commonly accepted meaning." *Commissioner v. Heininger*, 320 U.S. 467 (pp. 472, 471)

"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Man-*

*hattan General Equipment Company v. Commissioner,* 297 U.S. 129 (p. 134)

The Regulation "to the extent" it bars a deduction of the expenditures here in question is in contravention of the will of Congress expressed in Sec. 23(a)(1)(A) and hence to that "extent" is invalid. *Bingham's Trust v. Commissioner,* 325 U.S. 365 (p. 377)

**(2) The Regulation cannot be validly applied on the ground of statutory re-enactment.**

The Regulation at all times has been captioned "Contributions or gifts by individuals" and has been indexed under Sec. 23(o) of the Code relating to "Charitable and Other Contributions" by individuals. The body of the Regulation in referring to its application, at all times has made specific numerical reference to Sec. 23(o). The Regulation has never contained any specific numerical reference to Sec. 23 (a)(1)(A).

The Commissioner himself by his published acquiescence in the *Luther Ely Smith* decision (3 T.C. 696) has officially construed the Regulation as not applicable to expenditures incurred in connection with measures voted upon by the People.

The Supreme Court has construed the phrase of the Regulation "for lobbying purposes, the promotion or defeat of legislation . . ." as "the *ban* against deductions of amounts spent for *'lobbying'.*" *Textile Mills Sec. Corp. v. Commissioner,* 314 U.S. 326 (p. 337) (italics ours).

The term "lobbying" does not embrace "attempts to saturate the thinking of the community." *U. S. v. Rumely,* 345 U.S. 41 (p. 47).

In view of the foregoing, to impute to Congress an implied adoption of the instant application of the Regulation as a part of Sec. 23(a)(1)(A) is unreasonable and fictional.

The Supreme Court has held that expenditures incurred for the preservation of a taxpayer's business are "ordinary and necessary" and therefore fall within Sec. 23(a) beyond question. Hence the instant application of the Regulation contravenes Sec. 23(a). The doctrine of statutory re-enactment, therefore, in any event, cannot be invoked with respect to the instant application of the Regulation. "But where, as in this case, the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation." *Koshland v. Helvering,* 298 U.S. 441 (p. 447).

"Long-continued practice and the approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a statute, but cannot alter provisions that are clear and explicit *when related to the facts disclosed.*" *Louisville & N. R. Co. v. U. S.,* 282 U.S. 740 (p. 759) (italics ours).

"To hold otherwise would mean that taxpayers could never rely upon the clearest terminology of a statute." *Studies on Federal Taxation, Third Series,* Randolph E. Paul (p. 435).

Application of a Regulation which "operates to create a rule out of harmony with the statute, is a mere *nullity*". *Manhattan General Equipment Company v. Commissioner,* 297 U.S. 129 (p. 134) (italics ours)

The initial and continuing *"nullity"* of the application of the Regulation to expenditures of the type incurred in the instant case cannot be transformed into a *validity* under any theory of statutory re-enactment.

**(3) The Regulation cannot be validly applied on the ground of public policy.**

Public policy may be invoked only where it is clear that to allow a deduction of the expenditures would "frustrate sharply defined national or state policies proscribing particular types of conduct." *Commissioner v. Heininger,* 320 U.S. 467 (p. 473). "The policies frustrated must be national or state policies evidenced by some governmental declaration of them." *Lilly v. Commissioner,* 343 U.S. 90 (p. 97). Such public policy must be "sharply defined" because "The language of Sec. 23(a) contains no express reference to the lawful or unlawful character of the business expenses which are declared to be deductible." *Commissioner v. Heininger,* supra at p. 474.

In determining whether public policy can be invoked to bar expenditures as a deduction the particular facts of each case must be considered ". . . for each case should depend upon its peculiar circum-

stances . . .". *Commissioner v. Heininger,* supra at p. 473.

An allowance of the expenditures in question cannot violate any conceivable public policy. "Quite the contrary. The expenditure of money to enlighten and inform the public with respect of initiative measures is a perfectly proper and laudable activity. When the general public are called upon to enact or refuse to enact legislation, the more information they are given and the more widespread it is distributed the better." *Opinion of the District Court* (Tr. 29; see Appendix)

The Commissioner himself has expressly acknowledged that public policy is not violated where expenditures are incurred in connection with measures submitted to a vote of the People [Commissioner's Acquiescence in *Luther Ely Smith* case, Rev. Rul. 1944-24-11907-C.B. 1944].

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Taxpayers incurred the expenditures here as individuals in the exercise of their fundamental right of free speech and in the interest of preserving the continuance of their existing business. By disallowing the expenditures the Commissioner has imposed a drastic practical penalty on the exercise of those rights.

The Commissioner's sole justification in so doing is a Regulation issued by him. And this despite the holding of the Supreme Court that such expenditures are "ordinary and necessary"—the express declaration of

Congress that all "ordinary and necessary" expenses are deductible—the repeated holdings of the Supreme Court that a Regulation to the extent that its application contravenes the will of Congress is invalid.

The lower Court in upholding the action of the Commissioner gave no consideration at all to the question whether the Regulation as applied to the specific facts before the Court was in excess of the rule-making authority of the Commissioner. The lower Court merely relied on the language of the Regulation in the abstract and without more.

In so accepting the "shell" of the Regulation without examining the "kernel"—the basic question of the Commissioner's authority to apply the Regulation to the instant facts—the lower Court erred.

In 1574, Serjeant Plowden in *Eyston v. Studd,* Plowden's Reports (p. 465) said: "Our law, like all others, consists of two parts viz, of body and soul. The letter of the law is the body of the law, and the sense and reason of it is the soul, *quia ratio legis est anima legis.* And the law may be resembled to a nut, which has a shell, and a kernel within; the letter of the law represents the shell, and the sense of it the kernel. So you will receive no benefit by the law if you rely upon the letter."

In view of the decisions of the Supreme Court clearly demonstrating that the instant application of the Regulation contravenes the will of Congress expressed in Sec. 23(a), and in view of the absence of any valid or reasonable grounds for applying the Reg-

ulation to the instant expenditures, we respectfully urge that this Court find: that the Regulation cannot be validly applied to bar the instant expenditures as a deduction; that this Court further find that the instant expenditures are "ordinary and necessary" within the meaning of Sec. 23(a); that accordingly the judgment of the District Court be reversed.

Dated, March 7, 1957.

Respectfully submitted,

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**(Appendix Follows.)**

Appendix,

## Appendix

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**TREASURY REGULATIONS 111, SEC. 29.23(o)-1, PERTAINING TO INDIVIDUALS (1939 REVENUE CODE).**

(The Regulation as it existed during the tax year involved in the *Cammarano* case — 1948)

"Sec. 29.23(o)-1. Contributions or gifts by individuals.—

A deduction is allowable under section 23(o) only with respect to contributions or gifts which are actually paid during the taxable year, regardless of when pledged and regardless of the method of accounting employed by the taxpayer in keeping his books and records. A deduction is not allowable, however, for the actual payment of a contribution or gift if the amount of such payment already has been deducted on the accrual basis in computing net income for any taxable year beginning before January 1, 1938. A contribution or gift to an organization described in section 23(o) is deductible even though some portion of the funds of such organization is or may be used in foreign countries for charitable and educational purposes. This section does not apply to contributions or gifts by estates and trusts (see section 162). For computation of deductions for charitable contributions where the taxpayer also has an allowable deduction for medical expenses, see section 29.23(x)-1.

A contribution or gift to the United States, any State, Territory, or any political subdivision thereof, or the District of Columbia, or any possession of the

United States exclusively for public purposes, is deductible.

No reduction is allowed in computing the net income of a common trust fund or a partnership for contributions or gifts made to organizations described in section 23(o). (See sections 169 and 183.) However, a partner's proportionate share of contributions or gifts actually paid by a partnership during its taxable year to such organizations may be allowed as a deduction in his individual personal return for his taxable year with or within which the taxable year of the partnership ends, to an amount which, when added to the amount of contributions made by the partner individually and claimed as a deduction, is not in excess of 15 percent of his adjusted gross income or, for taxable years beginning prior to January 1, 1944, 15 percent of his net income computed without the benefit of the deduction for contributions. In the case of a nonresident alien individual or a citizen of the United States entitled to the benefits of section 251, see sections 213(c) and 251. For contributions or gifts by corporations, see section 29.23(q)-1.

In the case of husband and wife making a joint return, the deduction for contributions or gifts is the aggregate of such contributions or gifts made by the spouses, and is limited to 15 percent of the aggregate adjusted gross income of the spouses or, for taxable years beginning prior to January 1, 1944, 15 percent of the aggregate net income of the spouses computed without the benefit of the deduction for contributions.

A donation made by an individual to an organization other than one referred to in section 23(o) which bears a direct relationship to his business and is made with a reasonable expectation of a financial return commensurate with the amount of the donation may constitute an allowable deduction as business expense.

*Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.*

If the contribution or gift is other than money, the basis for calculation of the amount thereof shall be the fair market value of the property at the time of the contribution or gift.

In connection with claims for deductions under section 23(o), there shall be stated in returns of income the name and address of each organization to which a contribution or gift was made and the amount and the approximate date of the actual payment of the contribution or gift in each case. Claims for deductions under section 23(o) must be substantiated, when required by the Commissioner, by a statement from the organization to which the contribution or gift was made showing whether the organization is a domestic organization, the name and address of the contributor or donor, the amount of the contribution or gift and the date of the actual payment thereof, and by such other information as the Commissioner may deem necessary." (italics ours)

(The provision relating to lobbying expenditures was first inserted in the Regulation in 1938 and at that time the Regulation was indexed and captioned "Art. 23(o)-1. Contributions or gifts by individuals". The reference to "23(o)" was to Sec. 23(o) of the Code, entitled "Charitable and other contributions" and providing for the deduction of charitable contributions by individuals (previously the Regulation had been indexed under "Sec. 23(n)", the predecessor of Sec. 23(o). The Regulation thereafter continued to bear the same caption and the same index: "23 (o)-1".)

**TREASURY REGULATIONS 74, ART. 261 (INDEXED "SEC. 23(n)") PERTAINING TO INDIVIDUALS (1928 REVENUE CODE).**

(The Regulation as it existed during the tax years involved in the *Textile* case—predecessor of Reg. 111, Sec. 29.23(o)-1 previously set forth)

"Art. 261. Contributions or gifts by individuals.—Contributions or gifts made within the taxable year by an individual are deductible to an aggregate amount not in excess of 15 per cent of the taxpayer's net income (including such payments), if made to or for the use of:

(a) The United States, the District of Columbia, or any State or Territory or political subdivision thereof, for exclusively public purposes;

(b) Any corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, but only if no part of the net earnings inures to the benefit of any private shareholder or individual. (See article 527);

(c) The special fund for vocational rehabilitation authorized by section 7 of the Vocational Rehabilitation Act of June 27, 1918;

(d) Posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings

inures to the benefit of any private shareholder or individual; or

(e) A fraternal society, order, or association, operating under the lodge system, but only if such contributions or gifts are to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.

If, during the taxable year and each of the 10 preceding taxable years, the amount contributed in all the above cases combined plus the amount of income, war-profits, or excess-profits taxes paid during such year in respect of preceding taxable years exceeds 90 per cent of the taxpayer's net income for each such year, as computed without the benefit of this article, the full amount of such contributions and gifts made within the taxable year is deductible. (See section 120)

In connection with claims for deductions under this article, there shall be stated on returns of income the name and address of each organization to which a gift was made and the approximate date and the amount of the gift in each case. Where the gift is other than money, the basis for calculation of the amount thereof shall be the fair market value of the property at the time of the gift. His proportionate share of contributions made by a partnership may be claimed as a deduction in the personal return of a partner to an amount which, when added to the amount of contributions made by the partner indi-

vidually and claimed as a deduction, is not in excess of 15 per cent of the partner's net income computed without the benefit of the deduction for contributions. As to deduction of contributions by partnerships, see section 183 and article 901. In the case of a nonresident alien individual or a citizen of the United States entitled to the benefits of section 251, see sections 213(c) and 251 and articles 1051 and 11.33. This article does not apply to gifts by estates and trusts (see section 162 and article 862), nor does it apply to corporations."

## OPINION OF THE DISTRICT COURT
(March 19, 1956).

Boldt, District Judge:

Whatever doubt there may have been about the meaning and application of Treasury Regulation 111 §29.23(o)-1 when it was first adopted some twenty years ago, and for some time thereafter, there does not seem to be much room for doubt about it now in the light of all of the cited decisions construing and applying the regulation. Textile Mills Corp. v. Commissioner, 314 U.S. 326; Old Mission P. Cement Co. v. Commissioner, 69 F. 2d 676 (CA 9th); Sunset Scavenger Co. v. Commissioner, 83 F. 2d 948 (CA 9th); Roberts Dairy Co. v. Commissioner, 195 F. 2d 948 (CA 8th); American Hardware & Eq. Co. v. Commissioner, 202 F. 2d 126 (CA 4th); Revere Racing Association v. Scanlon, 137 Fed. Supp. 293 (D.C. Mass.).

This regulation has been held to have the force of law just as though it were a statute, and the regulation in brief says that sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda including advertising other than trade advertising, and contributions for campaign expenses are not deductible from gross income.

It will be observed that several different categories of expenses are referred to. Lobbying expense is one, sums expended for the promotion or defeat of legislation is another, the exploitation of propaganda is a separate category, and so on. Under the cases construing this language, particularly the Ninth Cir-

cuit case, Sunset Scavenger Co. v. Commissioner, supra, the meaning of the regulation as applied to the facts of this case is clear. In Webster's International Dictionary and in "Words and Phrases," the meaning of the word "legislation" is given as having to do with the making of laws, however made. There are many decisions to such effect. In other words, the making of laws is legislation whether the laws are made by a sovereign ruler, a city council, county commissioners, a state legislature, Congress, or by the people directly through an initiative or referendum measure.

In applying the regulation there is no rational basis for making a distinction between sums of money spent for the purpose of influencing the public in their action on an initiative measure and sums spent with the object of influencing members of the legislature with respect to pending legislation. There certainly is not any ground for making that distinction in the language of the Treasury regulation. The regulation flatly says that sums of money expended for the promotion or defeat of legislation are not deductible from gross income. An initiative measure is just as much legislation as an act of a legislature or any other enactment of law.

It is admitted in the record that the sums here in question were spent by the taxpayer for the purpose of defeating the enactment of certain legislation by initiative and that being so, those sums are not deductible from gross income. This is not to indicate

that there is anything evil or corrupt about spending money for these purposes. Quite the contrary. The expenditure of money to enlighten and inform the public with respect of initiative measures is a perfectly proper and laudable activity. When the general public are called upon to enact or refuse to enact legislation, the more information they are given and the more widespread it is distributed the better. Certainly neither this taxpayer nor the Washington Brewers Institute nor the brewing industry are in any manner to be criticized for having spent the money to defeat the legislation by fair publicity. They had a right to do that and propriety of expenditures therefor is not in question. But that has nothing whatever to do with whether the sums so spent by the taxpayer are deductible for income tax purposes. In that matter the regulation is controlling and clearly requires judgment in favor of defendant. So ordered.

George H. Boldt,
United States District Judge.